Supreme Court, U.S.
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No. 86-1122

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RUTH V. SMITH, Administratrix of the Estate of HARRY F. SMITH, Deceased
and
RITA LADZENSKY, Administratrix of the Estate of GERALD LADZENSKY, Deceased
and
CHARLES ALEXANDER SCOTT,
Appellants

v.

CITY OF PHILADELPHIA
and
PHILADELPHIA GAS WORKS
and
PHILADELPHIA FACILITIES MANAGEMENT CORPORATION,
Appellees

On appeal from the Order of the Supreme Court of Pennsylvania, reversing the Order of the Court of Common Pleas of Philadelphia County, entering a declaratory judgment as to a single question at issue between the parties in the underlying and currently pending litigation

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	ii
CONSTITUTIONAL PROVISIONS INVOLVED	vi
COUNTER-STATEMENT OF THE CASE	1
MOTION TO DISMISS	3
I. THE ORDER APPEALED FROM WAS NOT A FINAL JUDGMENT	3
II. THIS COURT DOES NOT HAVE JURISDICTION BECAUSE THE PENNSYLVANIA SUPREME COURT DID NOT NEED TO DECIDE THE FEDERAL ISSUE IN ORDER TO DISPOSE OF THIS CASE	5
III. STATE SUBSTANTIVE GROUNDS WERE CONTROLLING	8
IV. THIS COURT IS NOT EMPOWERED TO RENDER THE ADVISORY OPINION PLAINTIFFS SEEK	8
V. THERE IS NOT A SUBSTANTIAL FEDERAL QUESTION PRESENTED	9
MOTION TO AFFIRM	11
CONCLUSION	16

TABLE OF CITATIONS

CASES — Page

A.S. Abell Co. v. Sweeney, 274 Md. 715, 337 A.2d 77 (1975) 9

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) 8

Anderson v. City of Detroit, 54 Mich. App. 496, 221 N.W. 2d 168 (1974) 6

Ashcraft v. Mattis, 431 U.S. 171 (1977), rehearing denied, 433 U.S. 915 (1977) 8

Bonds v. State of California ex rel. California Highway Patrol, 87 Cal. Rptr. 792, 138 Cal. App. 3d 314 (1982) 6

Boyett v. Boyett, 269 Ark. 36, 585 S.W. 2d 86 (1980) 8

Carroll v. County of York, 496 Pa. 363, 437 A.2d 398 (1981) 11

Cauley v. City of Jacksonville, 403 So. 2d 396 (Fla. 1981) 6

Commonwealth Department of General Services v. Frank Briscoe Co., 502 Pa. 449, 466 A.2d 1336 (1983) 9

Cords v. State, 62 Wis. 2d 42, 214 N.W. 2d 405 (1974) 7

Crowe v. John W. Harton Memorial Hospital, 579 S.W. 2d 888 (Tenn. App. 1979) 6, 12

Dandridge v. Williams, 397 U.S. 471 (1970), reh. denied 398 U.S. 914 (1970) 6, 10

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978)..... 6, 10, 14, 15

Eastern Fine Paper, Inc. v. Carriage Trade Co. Inc., 457 A.2d 1111 (Me. 1983) 8

TABLE OF CITATIONS—*(Continued)*

CASES

	Page
Estate of Cargill v. City of Rochester, 119 N.H. 661, 406 A.2d 704, *appeal dismissed*, 445 U.S. 921 (1980)	6, 10, 11
Garcia v. Albuquerque Public School Board, 95 N.M. 391, 622 P.2d 699 (1981)	7
Gospel Army v. Los Angeles, 331 U.S. 543 (1946)	3
Green-Glo Turf Farms v. State, 347 N.W. 2d 491 (Minn. 1984)	6
Honeyman v. Hanan, 300 U.S. 14 (1937)	5
James v. SEPTA, 505 Pa. 137, 477 A.2d 1302 (1984)	7
Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965)	8
Jetton v. Jacksonville Electric Authority, 399 So. 2d 396 (Fla. 1981)	11
Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983)	6, 11
Liberty Warehouse Co. v. Burley Tobacco Growers' Co-Operative Marketing Ass'n., 276 U.S. 71 (1928)	4
North Dakota Pharmacy Board v. Snyder's Stores, 414 U.S. 156 (1973)	4
Pangburn v. Saad, 326 S.E. 2d 365, 73 N.C. App. 336 (1985)	7
Paulson v. County of Washington, 99 Wash. 2d 645, 664 P.2d 202; (1983); *appeal dismissed*, 464 U.S. 957 (1983)	7
Picariello v. Commonwealth, 54 Pa. Cmwlth. 250 421 A.2d 477 (1980)	11

TABLE OF CITATIONS—*(Continued)*

CASES Page

Republic National Gas Co. v. Oklahoma, 334 U.S. 62 (1948) 3

Sambs v. City of Brookfield, 97 Wis. 2d 356, 293 N.W. 2d 504, *cert. denied*, 449 U.S. 1035 (1980)..... 6, 9, 12

Samuels Pharmacy, Inc. v. Board of registration in Pharmacy, 390 Mass. 583, 458 N.E. 2d 728 (1983) 8

Seifert v. Standard Paving Co., 64 Ill. 2d 109, 355 N.E. 2d 537 (1976)..... 6

State v. Silva, 86 Nev. 911, 478 P.2d 591 (1971). 6, 12

Volkswagenwerk A.G. v. Watson, 181 Ind. App. 155, 390 N.E. 2d 1082 (1979) 8

White v. Montana, 661 P.2d 1272 (Mont. 1983)... 13

Wilson v. Cook, 327 U.S. 474 (1946)..... 5

Winston v. Reorganized School District R-2, 636 S.W. 2d 324 (Mo. 1982) 7

CONSTITUTIONS AND LAWS

Declaratory Judgments Act of 1976, P.L. 586, No. 142, §2, 42 Pa.C.S.A. §7531-41 . 1

Pennsylvania Constitution
Article I, §11 ..... 2, 7, 15
Article II, §18 2
Article III, §32..... 2, 5

Political Subdivision Tort Claims Act of 1978, P.L. 1399, No. 330, §101 *et seq.*,
53 P.S. §5311.101 *et seq*..... 1
53 P.S. §5311.202(b)(1) — (8) 1
53 P.S. §5311.402 1

TABLE OF CITATIONS—*(Continued)*

CONSTITUTIONS AND LAWS	Page
Subchapter C of the Judicial Code, Act of October 5, 1980, P.L. 639, No. 142, §221(1), 42 Pa.C.S.A. §8541-64 *et seq*	1
United States Constitution	
Tenth Amendment	5, 9, 11, 15
Fourteenth Amendment	6
Article III	8
28 U.S.C. §1257	3

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the references identified in Appellants' Jurisdictional Statement:

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article I, Section 11 of the Pennsylvania Constitution provides:

> All courts shall be open; and every man for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Article III, Section 32 of the Pennsylvania Constitution (its "equal protection" clause) provides in relevant part:

> The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:
>
> 1. Regulating the affairs of counties, cities, townships, wards, boroughs, or school districts.

COUNTER-STATEMENT OF THE CASE

Following an underground gas explosion on May 11, 1979, forty-four state tort actions were filed against the City of Philadelphia ("the City"), the Philadelphia Gas Works ("PGW"), its management corporation, and one private property owner. Those actions were assigned to a single judge for orderly disposition.

The City and PGW pled, among other affirmative defenses, the Political Subdivision Tort Claims Act[1] ("the Act"). The Act provides for governmental immunity as the general rule, but creates a waiver with respect to eight areas of activity.[2] It also provides for the waiver to be limited to $500,000 per occurrence.[3]

While the tort actions were pending, three of the claimants filed a joint declaratory judgment action, which was assigned to the same judge. The purpose of the declaratory judgment action was to collaterally challenge the limited waiver provision on state and federal constitutional grounds. The claimants argued that settlement of their claims was impossible without this legal determination.

The City moved to dismiss the action, pointing out that the Declaratory Judgments Act[4] is not available to secure advisory opinions — in this case, an opinion regarding the validity of an affirmative defense which might or might not be reached in a currently pending action. It also pointed out that a contrary construction of the Declaratory Judgments Act (a uniform act) would only spawn piecemeal litigation. The trial court initially

1. Act of November 26, 1978, P.L. 1399, No. 330, §101 *et seq.*, 53 P.S. §5311.101 *et seq.* The Act was subsequently codified, without substantial change, at Subchapter C of the Judicial Code by the Act of October 5, 1980, P.L. 693, No. 142, §221(1), 42 Pa. C.S.A. §§8541-8564 *et seq.*

2. 53 P.S. §5311.202(b)(1) — (8).

3. 53 P.S. §5311.402

4. Act of July 9, 1976, P.L. 386, No. 142, §2, 42 Pa. C.S.A. §§7531-41.

agreed and dismissed the complaint, but then reversed itself.

Plaintiffs moved for summary judgment, contending that Article III, Section 18 of the Pennsylvania Constitution prohibits all damage limitations and, secondarily, that the $500,000 provision violated the equal protection guarantees of Article III, §32 of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution. The City opposed the motion for the reasons that had been set forth in its motion to dismiss, there being many factual issues remaining, and on substantive grounds.

The trial court, in granting the plaintiffs' motion, did not discuss the propriety of plaintiffs' reliance on the Declaratory Judgments Act or the validity of their claim that there were no factual issues remaining. The court held that both Article III, Section 18 of the Pennsylvania Constitution and the equal protection guarantees of the Pennsylvania and United States Constitutions had been violated. It did not treat the federal aspect of the equal protection claim separately. Indeed, both the standard to be applied in reviewing such a claim and the basis for the court's conclusion were discussed exclusively with reference to state court decisions. (The opinion is reproduced in Appellant's Jurisdictional Statement, page B-1.)

On appeal, the Supreme Court of Pennsylvania reversed, holding that Article I, Section 11 of the Pennsylvania Constitution, which expressly allows the state legislature to regulate governmental liability, created an exception to the general prohibition of Article III, Section 18 against damage limitations. The court also held that since Article I, Section 11 guarantees access to the courts to sue the government in cases where it has consented to suit, equal protection analysis under the Pennsylvania Constitution requires the application of the intermediate or heightened standard of review. Applying

that standard, the court found that the $500,000 provision is closely related to the important governmental interest of preserving the public treasury against the possibility of unusually large recoveries in tort cases and upheld it. It did not treat separately the federal equal protection claim, as to which the more lenient rational relationship test would have applied.

The Court noted that the City had objected to its assumption of jurisdiction in order to decide in advance the constitutionality of an affirmative defense raised in pending litigation.[5] Implicitly conceding that the City's objections were meritorious, it explained that "in the interests of judicial economy," it would address the merits of the constitutional questions presented.[6]

MOTION TO DISMISS

I. THE ORDER APPEALED FROM WAS NOT A FINAL JUDGMENT

In order for a judgment of an appellate court to be final and reviewable for purposes of 28 U.S.C. §1257, "it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court . . . directed.' " *Gospel Army v. Los Angeles*, 331 U.S. 543, 546 (1946). Thus, the requirement of finality has not been met even where, unlike here, "the major issues in a case have been decided and only a few loose ends remain to be tied up — for example, where liability has been determined and all that needs to be adjudicated is the amount of damages." *Republic National Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948).

5. Opinion of the Pennsylvania Supreme Court, footnote 1.

6. The other objection reiterated by the City on appeal, upon which the court did not comment, was that summary judgment should not have been granted because a multiplicity of factual issues remained to be decided.

The declaration by the Pennsylvania Supreme Court that the $500,000 limitation provision is constitutional did not end the litigation between the parties. Liability has yet to be determined, as does the amount of damages to be awarded each plaintiff should the liability issues be determined in plaintiffs' favor. There has been no verdict, let alone an entry of judgment.

The trial may well have a significant effect on the continued vitality of the federal constitutional question. It may be that the local governmental defendants will ultimately be found not liable. It may be that a non-governmental defendant will be found liable and will make up the deficit, if any, between the verdicts and $500,000. It is the very uncertainty of the outcome of any underlying litigation that caused this court to declare in *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-Operative Marketing Ass'n.*, 276 U.S. 71 (1928):

> This court has no jurisdiction to review a mere declaratory judgment.

The finality requirement serves sound considerations of jurisprudence. It avoids the piecemeal review of state court decisions that would inevitably occur were this court to review declaratory judgments involving each issue which may or may not dispose of currently pending litigation. It avoids giving advisory opinions in cases such as this, where there is no real "case" or "controversy" within the meaning of Article III. Finally, it avoids unnecessary federal intrusion in state affairs. *See North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159 (1973).

This last purpose is particularly important here. The scope of state and local governmental immunity from tort actions recognized under the laws of the several states has traditionally been left to the states to decide. Nothing in the United States Constitution purports to delegate to the United States the authority to control state governmental tort liability. That power is reserved to the states

themselves through the 10th Amendment to the United States Constitution.

While plaintiffs may not find the decisions of the Pennsylvania General Assembly[7] and the Supreme Court of Pennsylvania to their liking, these matters are for the people of the Commonwealth of Pennsylvania to decide. Their choices should not be disturbed.

II. THIS COURT DOES NOT HAVE JURISDICTION BECAUSE THE PENNSYLVANIA SUPREME COURT DID NOT NEED TO DECIDE THE FEDERAL ISSUE IN ORDER TO DISPOSE OF THIS CASE

To be able to appeal to this court, plaintiffs must show not only that a federal question was presented to the highest court of the state having jurisdiction, but that its decision of that federal question was necessary for the determination of the case. *Wilson v. Cook*, 327 U.S. 474, 480 (1946); *Honeyman v. Hanan*, 300 U.S. 14, 18 (1937). That is not the case here and plaintiffs do not contend otherwise.

The Equal Protection Clause of the Pennsylvania Constitution, unlike that of the United States Constitution, has been construed to require application of the intermediate standard of review, or heightened scrutiny, where the challenged statutory enactment affects a would-be litigant's interest in recovery from the government. The challenged enactment obviously would pass scrutiny under the rational basis standard employed in federal constitutional analysis if it passed scrutiny under the stricter Pennsylvania standard. Therefore, the Pennsylvania Supreme Court did not treat the federal constitutional issue separately. It relied exclusively on Pennsylvania precedent, and ruled that the $500,000

7. The enactment challenged here grew out of a serious, exhaustive study, *Sovereign Immunity*, published in May, 1978 by the Joint State Government Commission of the General Assembly of the Commonwealth of Pennsylvania.

provision satisfied the intermediate standard of scrutiny applicable under the Pennsylvania Constitution. Any decision of the federal question was unnecessary, as explained more fully below.

In reviewing legislation under the Equal Protection Clause of the Fourteenth Amendment, this court has traditionally applied the rational relationship test in the area of economic legislation aimed at achieving a reasonable balance between society's interest in the fiscal stability of government and a private litigant's interest in monetary recovery. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), reh. denied 398 U.S. 914 (1970). That standard was applied specifically to a review of federal legislation restricting tort liability, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 93-94 (1978). This court held that the Price-Anderson Act, which imposes a limitation on liability for nuclear accidents resulting from the operation of privately owned nuclear power plants, did not violate equal protection guarantees. The "general rationality" of the Act was said to justify the limitation. *Id.*

Similarly, our sister state appellate courts have applied the rational basis test in reviewing federal equal protection challenges to statutory provisions creating waivers of governmental immunity up to certain amounts.[8] That standard was not applied here.

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8. *Cauley v. City of Jacksonville*, 403 So. 2d 379 (Fla. 1981); *Leliefeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983); *Seifert v. Standard Paving Co.*, 64 Ill. 2d 109, 355 N.E. 2d 537 (1976); *State v. Silva*, 86 Nev. 911, 478 P.2d 591 (1971); *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 406 A.2d 704, *appeal dismissed*, 445 U.S. 921 (1980); *Crowe v. John W. Harton Memorial Hospital*, 579 S.W. 2d 888 (Tenn. App. 1979); *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 293 N.W. 2d 504, *cert. denied*, 449 U.S. 1035 (1980). As to waivers limited to certain areas of activity: *Bonds v. State of California ex rel. California Highway Patrol*, 187 Cal. Reptr. 792, 138 Cal. App. 3d 314 (1982); *Anderson v. City of Detroit*, 54 Mich. App. 496, 221 N.W. 2d 168 (1974); *Green-Glo Turf Farms v. State*, 347

Noting that Article I, Section 11 of the Pennsylvania Constitution provides that suits may be brought against the government "in such manner, in such courts and in such cases as the Legislature may by law direct," the Pennsylvania Supreme Court had previously declared that the Pennsylvania Constitution elevates a party's interest in access to the courts in order to sue the government to the level of an "important interest." *James v. SEPTA*, 505 Pa. 137, 477 A.2d 1302 (1984). Therefore, analysis of an equal protection claim asserted under the Pennsylvania Constitution requires the application of an intermediate or heightened standard of review, where the challenged legislation adversely affects a party's interest in suing the government. *Id.* Citing *James*, the Pennsylvania Supreme Court declared that the intermediate or heightened standard was applicable here, where the challenged legislation restricted the amount of money recoverable from the government in state tort actions.

The court concluded that the $500,000 provision withstood heightened scrutiny since it was closely related to the important governmental interest it was intended to serve: preserving the public treasury against usually large recoveries in tort cases, such as those sought by the claimants here. Since the provision clearly would have withstood more relaxed scrutiny under the Fourteenth Amendment, there was no need for the court to engage in federal constitutional analysis.

N.W. 2d 491 (Minn. 1984); *Winston v. Reorganized School District R-2*, 636 S.W. 2d 324 (Mo. 1982); *Garcia v. Albuquerque Public School Board*, 95 N.M. 391, 622 P.2d 699 (1981); *Pangburn v. Saad*, 326 S.E. 2d 365, 73 N.C. App. 336 (1985); *Paulson v. County of Washington*, 99 Wash. 2d 645, 664 P.2d 202 (1983), *appeal dismissed*, 464 U.S. 957 (1983); *Cords v. State*, 62 Wis. 2d 42, 214 N.W. 2d 405 (1974).

III. STATE SUBSTANTIVE GROUNDS WERE CONTROLLING

In addition to showing that decision of the federal question was necessary for the determination of the case, plaintiffs must demonstrate that the federal question was controlling. Equal reliance on federal and state substantive grounds precludes United States Supreme Court review of the federal ground. *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 489 (1965). As explained in Part II, *supra*, the Supreme Court of Pennsylvania relied on the fact that the $500,000 provision withstood the more intense equal protection scrutiny of the Pennsylvania Constitution. Its reliance on the state substantive ground was not merely equal, as in *Jankovich*, but controlling. Accordingly, Supreme Court review of the federal equal protection claim is precluded.

IV THIS COURT IS NOT EMPOWERED TO RENDER THE ADVISORY OPINION PLAINTIFFS SEEK

Article III of the Constitution restricts this Court to determining only an actual case or controversy. For a declaratory judgment to issue, there must be a dispute which calls for "an adjudication of *present* right upon *established* facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937); rehearing denied 300 U.S. 687 (1937).[9] *Accord, Ashcraft v. Mattis*, 431 U.S. 171, 172

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9. Thus, state courts have consistently refused to construe the Uniform Declaratory Judgments Act, pursuant to which this matter was initiated, to allow for an adjudication in advance of an affirmative defense raised in a currently pending and unresolved action. *See Boyett v. Boyett*, 269 Ark. 36, 38, 585 S.W. 2d 86 (1980); *Volkswagenwerk A.G. v. Watson*, 181 Ind. App. 155, 159, 390 N.E. 2d 1082 (1979) (declaratory judgment proceeding not available to test validity of affirmative defense raised in products liability action); *Eastern Fine Paper, Inc. v. Carriage Trade Co. Inc.*, 457 A.2d 1111 (Me. 1983); *Samuels Pharmacy, Inc. v. Board of Registration in Pharmacy*, 390 Mass. 583, 458 N.E. 2d 728 (1983) (declaratory

(1977), rehearing denied, 433 U.S. 915 (1977). (Emphasis supplied). No "present right" of the plaintiffs is at stake here, nor has a single fact been "established." They do not presently have a right to recover anything from the governmental defendants, let alone monies in excess of $500,000. They also have not yet established that they will be unable to recover against the non-governmental defendants.

What plaintiffs seek, in reality, is a declaration that (1) should they prevail on their claims against the governmental defendants, (2) should the amounts awarded exceed $500,000, and (3) should the plaintiffs be unable to collect from any non-governmental defendants, *then* they will be able to recover unlimited amounts from the governmental defendants. This court is not empowered to issue such a declaration.

V. THERE IS NOT A SUBSTANTIAL FEDERAL QUESTION PRESENTED.

The power to regulate state tort liability in general and the immunity of the state and its political subdivisions from such liability in particular is reserved to the states through the Tenth Amendment to the United States Constitution. Although this court has had the opportunity to pass on similar issues in the past, it has consistently refused to do so. An application for a writ of certiorari was denied in *Sambs v. City of Brookfield, supra,* which involved a federal equal protection challenge to Wisconsin's $25,000 limitation on recovery from

judgment proceeding not available to restrain board from using allegedly illegally seized evidence in pending disciplinary proceedings; *A.S. Abell Co. v. Sweeney*, 274 Md. 715, 337 A.2d 77 (1975). Indeed, in *Commonwealth Department of General Services v. Frank Briscoe Co.*, 502 Pa. 449, 459, 466 A.2d 1336 (1983), the Pennsylvania Supreme Court itself declared that a declaratory judgment proceedings is not available to determine "in advance the validity of an affirmative distinguish" raised in a currently pending action. The Court did not distinguish or cite *Briscoe* in the instant case.

municipal governments. Plaintiffs' appeal was dismissed in *Estate of Cargill v. City of Rochester, supra,* which arose out of a federal equal protection challenge to New York's similar $50,000 limitation.

Plaintiffs advance two reasons why they believe a substantial federal question to exist. The first reason is that they believe the $500,000 provision to be "unjust." However, the wisdom or fairness of legislation is not a judicial issue in the first instance, let alone an issue of federal constitutional dimension. It is for the legislature, and not the courts, to weigh questions of fairness. *Dandridge v. Williams,* 397 U.S. 471, 484-485 (1970), reh. denied 398 U.S. 914 (1970).

The second reason plaintiffs advance is that the Pennsylvania Supreme Court's anaylsis of the equal protection issue did not track this court's analysis of the due process issue in *Duke Power Co. v. Carolina Environmental Study Group, Inc., supra.* Why it should have done so plaintiffs fail to explain. The only analysis in *Duke Power* at all relevant to this case is the equal protection analysis. However, as explained in Part II, *supra,* the Pennsylvania Supreme Court elected to apply the more stringent heightened standard of review applicable to Pennsylvania constitutional analysis, rather the rational relationship test applicable to federal constitutional analysis and used by this court in *Duke Power.*

Even more important, the fact that a substantial federal question was presented in *Duke Power* does not mean that one exists here. *Duke Power* involved the ruling by a federal district court that a federal statute purporting to limit the recovery available against private nuclear power plant operators violated the federal constitutional guarantee of due process. This case involves an act of the Pennsylvania General Assembly, not the United States Congress, and a ruling that the challenged provision does not violate the more stringent state equal protection standard. It must also be recognized that the $500,000 provision merely creates a limited waiver of the

government's immunity from tort liability and that the Tenth Amendment to the United States Constitution reserves to the states the power to regulate tort liability in general and the liability of the states and their political subdivisions in particular.

MOTION TO AFFIRM

This Court should affirm the order of the Pennsylvania Supreme Court both because the federal question plaintiffs seek to raise is insubstantial (*see* Part V, *supra*) and because the $500,000 provision is rationally related to its intended goal. The purpose of that provision, as noted by the Supreme Court of Pennsylvania, is to protect the public treasury and allow for risk management at the local level. *Carroll v. County of York,* 496 Pa. 363, 369, 437 A.2d 398 (1981).

To the same effect, Pennsylvania's intermediate appellate court commented:

> A balance must be struck between unlimited potential liability and the need for fiscal security. Full monetary responsibility for the tortious conduct of its agencies and employees involves the risk of an intolerable tax burden. . .

Picariello v. Commonwealth, 54 Pa. Cmwlth. 250, 256-257, 421 A.2d 477 (1980). The same conclusion has been reached in Pennsylvania's sister jurisdictions.

Indeed, far lower limitations on damage recovery have uniformly been upheld. *Jetton v. Jacksonville Electric Authority,* 399 So. 2d 396 (Fla. 1981) (Florida's $50,000 per person/$100,000 per incident limitation is rational because it "permit[s] governmental units to order their fiscal planning"); *Leliefeld v. Johnson, supra* (Idaho's $100,000 per person/$300,000 per incident limitation upheld); *Estate of Cargill v. City of Rochester, supra* (New York may legitimately limit the tort liability of its political subdivisions to $50,000 per claim because

"there are real and vital differences between the situations of governmental units and of private parties as potential tort defendants"); *Crowe v. John W. Harton Memorial Hospital, supra* (Tennessee's $20,000 limitation upheld); *State v. Silva, supra* (Wisconsin's $25,000 per person limitation on recovery from municipal governments upheld). Plaintiffs' claim that Pennsylvania's $500,000 per incident provision is the first to be upheld and therefore "sets a . . . precedent for other states to follow" clearly is unfounded.

While plaintiffs claim that the $500,000 provision is "unfair," that is not a basis for raising a federal constitutional challenge. It is not for our courts to question the wisdom of an act of the legislature. As the Wisconsin Supreme Court observed in rejecting a similar equal protection challenge to a $25,000 limitation on recovery:

> It is the *Legislature's* function to evaluate the risks, the extent of exposure to liability, the need to compensate citizens for injury, the availability and costs of insurance, and the financial condition of the governmental units.

Sambs v. City of Brookfield, supra, 293 N.W. 2d at 511. Significantly, this court refused plaintiffs' application for a writ of certiorari in that case.

The Wisconsin Supreme Court also observed that the government's needs for damage limitations were legitimate, given the activities in which it is required to engage:

> Government engages in activities of a scope and variety far beyond that of any private business, and governmental operations affect a larger number of people. Municipal units of government maintain hundreds and thousands of miles of streets and highways and drains and sewers, subject to many hazards; they operate numerous traffic signals, parking lots, office buildings, institutions, parks,

> beaches, and swimming pools used by thousands of citizens. Damage actions against a governmental entity may arise from a vast scope and variety of activities. A claim against a government may range from a few dollars to a few million dollars.
>
> . . . [U]nlimited recovery to all victims may impair the ability of government to govern efficiently.

Id. For the same reasons, the Pennsylvania Supreme Court declared in this case (Opinion at p. A-8) that "preservation of the public treasury against the possibility of unusually large recoveries in tort cases, is, self-evidently, an important governmental interest."

The only case plaintiffs rely upon to the contrary, *White v. Montana,* 661 P.2d 1272 (Mont. 1983), a 4-3 decision, involved not a challenge to limitation on governmental tort liability, but a challenge to a prohibition against recovery for non-economic harm. Nothing in *White* suggests that there is a right to unlimited recovery from the government. Indeed, following *White,* the Montana legislature reenacted the same statutory provision, adding only the right to recover for non-economic losses up to the same amount to which they could recover for economic losses.

In conjunction with their claim that the $500,000 provision is "unfair," plaintiffs contend that it was "plainly, palpably and unequivocally" intended to serve a second goal of allowing for substantial recovery from the government and is unconstitutional because their individual recoveries will not be as substantial as they would have liked. Like Lady Macbeth, they protest too much. Their extravagantly worded claim regarding a secondary purpose is not followed by a single citation to case law or the legislative history of the Act. Perhaps that is because the Pennsylvania Supreme Court declared that the provision had but one purpose: the "preservation of the public treasury against the possibility of unusually large recoveries in tort cases." (A-8) The drafters of the Act

were concerned not with assuring putative litigants substantial amounts of money, but with alleviating governmental tort liability.

Next, plaintiffs claim that the $500,000 provision has not been uniformly applied. That claim is neither supported by the record nor properly before this court. At the trial level, plaintiffs limited themselves to a facial attack on the provision. They did not introduce any evidence regarding its application. When they attempted to raise the MOVE disaster payment for the first time during oral argument before the Supreme Court, they were told that that discussion was not properly before the Court. In any event, the MOVE situation, unlike this gas explosion, involved federal civil rights claims which cannot be subject to state legislative control or limitation.

As another adjunct of their claim that the $500,000 limitation is "unfair," plaintiffs assert that the jurist to whom their claims have been assigned will allow the fund to be depleted by the first claimant whose case is tried. That claim is speculative at best. At worst, it evinces an unsupported lack of faith in the integrity of the court. Insurance policy proceeds frequently are distributed among multiple claimants. There is no reason to believe that an orderly and proportionate dispersal of the fund will not occur. In any event, that issue is not presently before this court.

Plaintiffs assert, lastly, that this case must be reviewed because it is inconsistent with *Duke Power Co. v. Carolina Environmental Study Group Inc., supra.* That assertion is meritless. First, *Duke Power Co.* involved federal legislation. The only questions before this court were federal questions; to wit, whether the limitation on damages imposed by the Price-Anderson Act in favor of private nuclear power plant operators was violative of the Due Process Clause of the Fifth Amendment or the Equal Protection Clause of the Fourteenth Amendment. This case, in contrast, involves state legislation. The only questions resolved by the Pennsylvania Supreme Court

were questions of state constitutional law. The federal jurisdictional basis so clearly present in *Duke Power Co.* is entirely absent here. This case should not be reviewed because there is no jurisdictional basis for doing so.

Second, *Duke Power Co.* involved a limitation on recovery from private parties. Nothing in the United States Constitution provides for immunity in favor of private parties. Here, to the contrary, the Tenth Amendment of the United States Constitution and Article I, Section II of the Pennsylvania Constitution give the Pennsylvania General Assembly the right to regulate the tort liability of the state and their political subdivisions. As the Supreme Court of Pennsylvania observed at p. A-5 of its opinion, the constitutional right to preclude recovery altogether necessarily includes the lesser right to merely limit it:

> If the legislature may abolish a cause of action, surely it may also limit the recovery on the actions which are permitted.

Third, plaintiffs rely on this court's analysis under the Due Process Clause of the Fifth Amendment, whereas this is an equal protection claim. The equal protection claim disposed of by this court did not rely upon the multi-pronged "test" plaintiffs have constructed. The only test used was whether the limitation on recovery was rationally related to the declared purpose of the Price-Anderson Act — *i.e.*, to encourage private participation in the exploitation of nuclear energy. This court held that it was. Here, the liability limitation is also justified. It is directly related to the important governmental purpose of protecting the public treasury against unusually large tort recoveries and allowing for reasonable risk management.

CONCLUSION

There are several compelling reasons why this appeal must be dismissed: (1) the order appealed from is not a final judgment; (2) the Pennsylvania Supreme Court did not need to decide the federal constitutional issue in order to dispose of the case, and did not in fact do so; (3) the state constitutional issue, rather than the federal issue, was controlling, and (4) there is not a substantial federal question presented for this court's review. In the alternative, it is respectfully requested that the Order of the Supreme Court of Pennsylvania be affirmed.

Respectfully submitted,

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